

KIESEL BOUCHER LARSON LLP
PAUL R. KIESEL (SBN 119854)
8648 Wilshire Boulevard
Beverly Hills, California 90211-2910
Telephone: (310) 854.4444
Facsimile: (310) 854.0812
kiesel@kbla.com

HORWITZ, HORWITZ
& PARADIS, Attorneys At Law
PAUL O. PARADIS
28 West 44th Street – 16th Flr.
New York, NY 10036
Telephone: (212) 404-2200
Facsimile: (212) 404-2226
pparadis@hhplawny.com

Attorneys for Plaintiff Steven Nakash
Additional counsel appear on signature page

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Steven Nakash,

Plaintiff,

v.

NVIDIA Corp.,

Defendant.

Case No. C 08-04312 JW

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: February 23, 2009
Time: 10:00am

Background and Procedural History

Between September 12, 2008 and November 18, 2008, eight class action lawsuits were filed against NVIDIA Corporation (“NVIDIA”) and Hewlett-Packard Co. (“HP”) (collectively, “Defendants”). The actions allege Defendants knowingly sold defective graphical processing units (“GPUs”). The various actions are:

Case	Date Filed	Venue Filed
<i>Nakash v. Nvidia Corp.</i> , No. 08-04312-JW	September 12, 2008	N.D. Cal, San Francisco Division
<i>Feinstein v. NVIDIA Corp.</i> , No. 08-04596-RS	Sept. 12, 2008	California state court. Removed to this Division, Oct. 2, 2008
<i>Inicom Networks, Inc. v. NVIDIA Corp. et al.</i> , No. 08-04332-JF	Sept. 15, 2008	N.D. Cal., San Jose Division
<i>Olivos v. NVIDIA Corp., et al.</i> , No. 08-03895-LDW	Sept. 23, 2008	Federal Court, E.D.N.Y.
<i>Sielicki v. NVIDIA Corp., et al.</i> , No. 08-0802-SS	October 29, 2008	Federal Court, W.D. Tex.
<i>Cormier v. NVIDIA Corp.</i> , No. 08-05082-HRL	November 6, 2008	N.D. Cal., San Jose Division
<i>Waidzunus v. Hewlett- Packard Co.</i> , No. 08-05081	Nov. 6, 2008	N.D. Cal., San Jose Division
<i>National Business Officers Association, Inc. v. NVIDIA Corp. et al.</i> , No. 08-5179- HRL	Nov. 14, 2008	N.D. Cal., San Jose Division
<i>West v. NVIDIA Corp.</i> , No. 08-05217-PVT	Nov. 18, 2008	N.D. Cal., San Jose Division

1 Both NVIDIA and HP are named defendants in the *Inicom*, *NBOA* and
2 *Olivos Actions*. *Inicom* Cplt. at ¶ 14; *NBOA* Cplt. at ¶ 19; *Olivos* Cplt. at ¶ 17. HP
3 is the sole defendant in the *Waidzunas* case. Each of the actions is now pending in
4 this Court after having been filed here originally, removed to this Division, or
5 transferred pursuant to 28 U.S.C. § 1404(a).

6 Between December 2008 and February 2009, this Court entered a series of
7 orders finding that the *Nakash*, *Feinstein*, *Inicom*, *Cormier*, *NBOA*, *West*, *Olivos*,
8 *Sielicki* actions were related. In addition, on January 16, 2009, the Court granted
9 HP's Administrative Motion to Relate the *Waidzunas Action* to the *Inicom Action*.
10 The *Nakash*, *Feinstein*, *Inicom*, *Olivos*, *Sielicki*, *Cormier*, *NBOA*, *West* and
11 *Waidzunas Actions* are collectively hereinafter referred to as the "Related Actions".

12 HP has also been named a defendant in two other cases. On December 19,
13 2008, a class action entitled, *LeBlanc v. Hewlett-Packard Co.*, Case No. 08-05081-
14 RMW (the "*LeBlanc Action*"), was filed in the United States District Court for the
15 District of New Jersey. On January 22, 2009 a class action entitled *Decker v.*
16 *Hewlett-Packard Co.*, Case No. 09-0295 (the "*Decker Action*"), was filed in this
17 Division. The *LeBlanc Action* was transferred to this Court by stipulation as Case
18 No. 09-00328 on January 26, 2009. Both the *LeBlanc Action* and the *Decker*
19 *Action* allege claims arising from the sale of defective NVIDIA GPUs installed in
20 HP computers. HP is the sole defendant in the *LeBlanc Action* and the *Decker*
21 *Action*.

22 On February 2, 2009, HP filed an Administrative Motion to Relate the
23 *LeBlanc Action* to the *Inicom Action* because both cases allege claims against HP
24 arising from the sale of defective NVIDIA GPUs. This motion remains *sub judice*.

25 Plaintiffs in the Related Actions (other than Plaintiff Cormier) (collectively
26 hereinafter "Plaintiffs"), along with Defendants, submit this Joint Case
27
28

1 Management Statement.¹

2 **I. JURISDICTION AND SERVICE**

3 This Court has jurisdiction over the claims asserted in the Related Actions
4 pursuant to 28 U.S.C. § 1332, as diversity between the parties exists and the matter
5 in controversy exceeds the sum or value of \$5 million. *Nakash* Cplt. at ¶11; *Inicom*
6 Cplt. at ¶9; *NBOA* Cplt. at ¶11, *West* Cplt. at ¶12; *Olivos* Cplt. at ¶10. Venue is
7 proper in this Judicial District because Defendants maintain their executive offices
8 in this District and conduct substantial business in this District, including the
9 advertising, marketing, distribution, and sale of the NVIDIA GPU's at issue in the
10 Related Actions. *Nakash* Cplt. at ¶12; *Inicom* Cplt. at ¶11; *NBOA* Cplt. at ¶13, *West*
11 Cplt. at ¶12; *Olivos* Cplt. at ¶13.

12 Defendants do not dispute personal jurisdiction or venue in this jurisdiction,
13 and have accepted service of the Complaints in the Related Actions. Defendants
14 dispute Plaintiffs' characterization of Defendant's connections to California or this
15 District.

16 **II. FACTUAL ISSUES**

17 Plaintiffs' Factual Statement

18 Plaintiffs have brought the Related Actions against NVIDIA and HP, both in
19 their individual capacities and as class actions on behalf of all persons who
20 purchased a computer (the "Computers") equipped with a defective NVIDIA
21 GeForce Series graphics processing unit (the "NVIDIA GPU") (the "Class").
22 *Nakash* Cplt. at ¶¶ 1, 7, 49; *Inicom* Cplt. at ¶¶ 1, 13, 16; *NBOA* Cplt. at. ¶¶ 17, 38;
23 *West* Cplt. at ¶¶ 1, 7, 48; *Olivos* Cplt. at ¶¶ 1, 15, 19.

24 Plaintiffs allege the NVIDIA GPU is the primary component in the
25
26

27 ¹ Plaintiff Cormier is represented by Shalov Stone Bonner & Rocco, LLP. Because
28 Plaintiff Cormier has determined to submit his own case management statement, Plaintiff
Cormier is not a signatory to this case management statement.

1 Computers for generating graphics. NVIDIA GPUs are affixed to a die, which is
 2 then affixed to the Computer's motherboard, and housed in certain packaging
 3 material. *Nakash* Cplt. at ¶¶16, 18, 20; *Inicom* Cplt at ¶23; *NBOA* Cplt. at ¶21, *West*
 4 Cplt. at ¶¶4, 27; *Olivos* Cplt. at ¶¶4, 26.

5 Plaintiffs contend the NVIDIA GPUs are defective because they prematurely
 6 cease to operate due to a defective die/packaging material set. *Nakash* Cplt. at ¶¶
 7 21; *Inicom* Cplt. at ¶¶ 2, 24; *NBOA* Cplt. at. ¶¶ 2, 36; *West* Cplt. at ¶¶ 21; *Olivos*
 8 Cplt. at ¶¶ 2, 44. Once the GPU ceases to operate, the Computer's display monitor
 9 exhibits the following symptoms, including, but not limited to: (i) video related
 10 issues (e.g. no video); (ii) multiple images on the display screen; (iii) random
 11 characters on the display screen; or (iv) horizontal or vertical lines on the display
 12 screen. *Nakash* Cplt. at ¶¶ 3, 21, 22; *Inicom* Cplt. at ¶¶ 3, 28, 40, 45; *NBOA* Cplt.
 13 at. ¶¶ 2, 24, 31; *West* Cplt. at ¶¶ 3, 21, 22; *Olivos* Cplt. at ¶¶ 2, 30. 40.

14 Because of NVIDIA's design defect, thousands of consumers who purchased
 15 the Computers have experienced: (i) computer crashes due to the NVIDIA GPU
 16 failures, as evidenced by the hundreds of consumer complaints on the Internet.
 17 *Nakash* Cplt. at ¶¶ 22, 23; *Inicom* Cplt. at ¶¶ 4, 43; *NBOA* Cplt. at. ¶¶ 8, 34; *West*
 18 Cplt. at ¶¶ 22, 23; *Olivos* Cplt. at ¶¶ 5, 27; (ii) property damage, including without
 19 limitation, damage to the computers in which the defective NVIDIA GPU's are
 20 installed; and (iii) damages related to and arising from loss of use of the Computers
 21 in which the defective NVIDIA GPUs are installed.

22 Plaintiffs allege Defendants knew or should have known about the design
 23 defect found in the NVIDIA GPUs by November 2007 because an investigation
 24 undertaken by HP revealed the defect with the NVIDIA GPUs. *Nakash* Cplt. at
 25 ¶¶4, 27; *Inicom* Cplt at ¶24; *NBOA* Cplt. at ¶22, *West* Cplt. at ¶¶4, 27; *Olivos* Cplt.
 26 at ¶¶6, 27.

27 In its July 2, 2008 Form 8-K, NVIDIA admitted the existence of the design
 28 defect in its GPUs:

On July 2, 2008, NVIDIA Corporation stated that it would take a \$150 million to \$200 million charge against cost of revenue to cover anticipated customer warranty, repair, return, replacement and other consequential costs and expenses arising from a weak die/package material set in certain versions of our previous generation MCP and GPU products used in notebook systems.

Nakash Cplt. at ¶28; *Inicom* Cplt at ¶24; *NBOA* Cplt. at ¶22, *West* Cplt. at ¶28; *Olivos* Cplt. at ¶27.

The same day, NVIDIA issued a press release and provided a “Second Quarter Fiscal 2009 Business Update” and again admitted the existence of the design defect. *Nakash* Cplt. at ¶29; *West* Cplt. at ¶29.

Instead of recalling the defective GPUs, NVIDIA has sat by as OEMs such as Dell, Acer and HP institute inadequate remedies, which fail to cure the defect. *Nakash* Cplt. at ¶¶ 4, 24, 28-33; *Inicom* Cplt. at ¶¶ 6, 44, 47 -49; *NBOA* Cplt. at. ¶¶ 3, 6, 22, 36-37; *West* Cplt. at ¶¶ 4, 24, 28-33; *Olivos* Cplt. at ¶¶ 3, 7, 44-45. As a result, Plaintiffs and Class members have been damaged.

NVIDIA’s Factual Statement

NVIDIA sells GPUs and media and communication processor (“MCP”) products. Such GPUs and MCPs are used in computers manufactured and sold by HP and other Original Equipment Manufacturers (“OEMs”). On July 2, 2008, NVIDIA stated that it would take a charge against revenue to cover anticipated customer warranty, repair, return, replacement and other consequential costs and expenses arising from failures of certain notebook configurations of these MCP and GPU products due to several factors, including (1) a weak material set of die/package combination, (2) system thermal management designs, and (3) customer use patterns.

Upon learning of the MCP and GPU failures, NVIDIA took appropriate steps to remedy the situation, which included working closely with its OEM customers, like HP. In addition, OEMs such as HP provided some extended warranties for

1 allegedly defective products.

2 Among other things, NVIDIA disputes whether (1) any NVIDIA product at
3 issue in the complaints was inherently defective and not of merchantable quality;
4 (2) assuming any products were defective and/or not of merchantable quality, that
5 any defendant knowingly sold defective products or products containing defective
6 parts; (3) plaintiffs suffered any cognizable or recoverable damages, and (4)
7 whether defendants caused any of the alleged damage. NVIDIA disputes Plaintiffs'
8 other allegations, including allegations relating to consumer protection, unfair
9 business practice, false advertising and related statutes, as well as unjust enrichment
10 and other common law theories of liability.

11 HP's Factual Statement

12 Plaintiffs claim that HP knowingly sold certain notebook computer models
13 containing allegedly defective Nvidia graphics chip components. Plaintiffs further
14 contend that these allegedly defective Nvidia graphic chip components caused
15 degraded performance in the allegedly affected computers. HP denies that it
16 knowingly sold defective computers, or that the allegedly affected computers suffer
17 from any common defect that impacts the performance of all putative class
18 member's computers.

19 As of October 31, 2007, HP implemented a formal warranty and repair
20 program (the "Program") that extends the warranty for the allegedly defective
21 computers. The Program makes free repairs available to customers for one year
22 after the expiration of the Limited Warranty. Thus, to the extent the allegedly
23 affected units suffer from any problem, HP has agreed to repair that problem free-
24 of-charge. It is HP's position that the download and/or repair cured the alleged
25 problem, that no law has been broken, and that Plaintiffs are not entitled to
26 additional relief
27
28

1 **III. LEGAL ISSUES**

2 **Plaintiffs' Statement of Legal Issues**

3 **1. Nakash**

4
5 Plaintiff Nakash asserts the following five causes of action: (i) breach of the
6 implied warranty of merchantability pursuant to N.J. Stat. § 12A: 2-314; (ii) breach
7 of the implied warranty of merchantability pursuant to Alaska Stat. § 45.02.314;
8 Haw. Rev. Stat. § 490:2-314; Burns Ind. Code Ann. § 26-1-2-314; Mich. CLS §
9 440.2314; N.J. Stat. § 12A:2-314; Pa. Cons. Stat. § 2-314 and South Dakota Cod.
10 Laws § 57A-2-314; (iii) violations of New Jersey Consumer Fraud Act, N.J. Stat.
11 Ann. § 56:8-1 *et seq.*; (iv) unjust enrichment under New Jersey common law; and
12 (v) unjust enrichment under the common law of Arkansas, California, Colorado,
13 Connecticut, Hawaii, Indiana, Iowa, Michigan, Mississippi, Missouri, Nebraska,
14 New Hampshire, New Jersey, New York, Oklahoma, Vermont and West Virginia.

15 **2. Inicom**

16
17 Plaintiff Inicom asserts the following five causes of action: (i) violations of
18 California Business and Professions Code §§ 17200 *et seq.*; (ii) breach of express
19 and implied warranties; (iii) breach of written warranty under Magnuson-Moss Act
20 (15 U.S.C. §§ 2301 *et seq.*); (iv) money had and received/unjust enrichment; and
21 (v) declaratory judgment.

22 **3. Feinstein**

23
24 Plaintiff Feinstein asserts the following five causes of action: (i) violations of
25 California's Consumer Legal Remedies Act; (ii) violations of California's Business
26 & Professional Code § 17200; (iii) violations of California's Business &
27 Professional Code § 17500; (iv) unjust enrichment; and (v) strict liability.
28

1 **4. NBOA**

2 Plaintiff NBOA asserts the following five causes of action: (i) violations of
3 California Business and Professions Code §§ 17200 *et seq.*; (ii) breach of express
4 and implied warranties; (iii) breach of written warranty under Magnuson-Moss Act
5 (15 U.S.C. §§ 2301 *et seq.*); (iv) unjust enrichment; and (v) declaratory judgment.

6 **5. West**

7 Plaintiff West asserts the following four causes of action: (i) breach of the
8 implied warranty of merchantability pursuant Iowa Code § 554.2314; (ii) breach of
9 the implied warranty of merchantability pursuant to Alaska Stat. § 45.02.314; Ark.
10 Code Ann. § 4-2-314; CRS § 4-2-314; 6 Del. C. § 2-314; HR § 490:2-314; Iowa
11 Code § 554.2314; 11 M.R.S.A. § 2-314; Md. Code Ann. Art. 95B § 2-314; Mass.
12 Gen. Laws. Ch. 106 § 2-314; MCLS § 440.2314; Minn. Stat. § 336.2-314; Miss.
13 Code. An. § 75-2-314; MCA 30-2-314; Neb. UCC 2-314; NRS 104.2314; RSA
14 382-A:2-314; N.J.S.A. 12A:2-314; NDCC 2-314; O.S. 1991 § 2-314; S.C. Code
15 An. § 36-2-314; SDCL 57A-2-314; VA. Code § 8.2-314; W. VA. Code § 46-2.314
16 and Wyo. Stat. 34.1-2-314.36; (iii) unjust enrichment under Iowa common law;
17 and (iv) unjust enrichment under the common law of the States of Arkansas,
18 California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Michigan, Mississippi,
19 Missouri, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Vermont
20 or West Virginia.

21 **6. Olivos**

22 Plaintiff Olivos asserts the following six causes of action: (i) breach of
23 express warranty; (ii) breach of implied warranty; (iii) violations of N.Y. Gen. Bus.
24 Law § 349; (iv) breach of written warranty under Magnuson-Moss Act (15 U.S.C.
25 §§ 2301 *et seq.*) (v) unjust enrichment; and (vi) declaratory relief.

1 7. Sielicki

2 Plaintiff Sielicki asserts three causes of action: (i) breach of written warranty
3 under Magnuson-Moss Warranty Act, 15 U.S.C. §§ 22301 *et seq.*; (ii) breach of
4 express and implied warranties; and (iii) unjust enrichment.

5 8. Waidzunas

6 Plaintiff Waidzunas asserts the following five causes of action: (i) violations
7 of California Business and Professions Code §§ 17200 *et seq.*; (ii) violations of
8 California Business and Professions Code §§ 17500 *et seq.*; (iii) breach of express
9 warranty; (iv) breach of implied warranty under the Song-Beverly Act (Cal. Civ.
10 Code § 1790, *et seq.*); and (v) violations of the California Legal Remedies Act
11 pursuant to C.C.P. § 382.

12 **Defendants' Statement of Legal Issues**

13 Given the likelihood that a superseding, consolidated amended complaint is
14 forthcoming, it is premature at this juncture to identify the disputed points of law.
15 Once the consolidated complaint is filed, Defendants will be able to ascertain the
16 nature and scope of the claims being asserted against them, if any, as well as which
17 states' laws are implicated. Nevertheless, in their current form, the above-
18 referenced complaints purport to state claims for, *inter alia*, violations of California
19 Business & Professions Code § 17200, *et seq.*, breach of written and implied
20 warranties under the laws of multiple states, and various equitable claims, again
21 under the laws of multiple states. Defendants deny all liability arising from these,
22 or any, claims. Moreover, Defendants do not believe that these claims are suitable
23 for class treatment and will oppose certification should the litigation proceed to that
24 point.
25
26
27
28

1 **IV. MOTIONS**

2 **A. Prior and Pending Motions**

3 On October 24, 2008, Plaintiff Nakash filed a Motion To Transfer the
4 *Nakash Action* from the United States District Court for the Northern District of
5 California - San Francisco Division (where it was initially filed) to the San Jose
6 Division; Consolidate the *Nakash Action* with the *Feinstein Action* and Appoint Co-
7 Lead and Trial Counsel. On October 27, 2008, the *Nakash Action* was re-assigned
8 to the San Jose Division and on October 28, 2008, the *Nakash Action* was then
9 assigned to the Honorable James Ware.

10 On November 7, 2008, the parties to the *Nakash* and *Feinstein Actions* filed a
11 Stipulation and Proposed Order to transfer the *Nakash* and *Feinstein Actions* to the
12 Honorable Jeremy Fogel (before whom the *Inicom Action* was pending), and to
13 consolidate the *Nakash*, *Feinstein*, and *Inicom Actions* (the “Motion to Transfer and
14 Consolidate”). On December 3, 2008, this Court granted in part and denied in part
15 the Motion to Transfer and Consolidate. The Court found the *Nakash* and *Feinstein*
16 *Actions* related, but denied the motion to consolidate the *Nakash* and *Feinstein*
17 *Actions*. The Court also denied the motion to relate the *Nakash* and *Feinstein*
18 *Actions* to the *Inicom Action*, and denied the motion to transfer the *Nakash* and
19 *Feinstein Actions* to Judge Fogel.

20 On December 9, 2008, Defendant NVIDIA filed four separate motions to
21 relate the *West*, *NBOA*, *Cormier* and *Inicom Actions* to the *Nakash Action*. After the
22 *Olivos Action* was transferred to the Northern District of California, on December
23 10, 2008, Defendant NVIDIA also filed a motion to relate the *Olivos Action* to the
24 *Nakash Action*. NVIDIA’s five motions to relate the *West*, *NBOA*, *Cormier*, *Inicom*
25 and *Olivos Actions* are collectively referred to herein as the “Motions to Relate.”

26 After filing the Motions to Relate, on December 10, 2008, Defendant
27 NVIDIA filed a Motion to Consolidate Related Actions and Require Superseding
28

1 Complaint (the “Motion to Consolidate Related Actions”) and a Motion to Take
2 Judicial Notice of documents cited therein (the “Motion to Take Judicial Notice”).

3 On December 12, 2008, all Plaintiffs, except for Cormier and Feinstein, filed
4 Plaintiffs’: (i) Joinder In Defendant NVIDIA’s Motion To Consolidate Related
5 Actions and (ii) Motion For Appointment Of Co-Lead Counsel (“Joinder and
6 Motion To Appoint”).

7 On December 16, 2008, Plaintiffs Cormier and Feinstein each filed a joinder
8 in Defendant NVIDIA’s Motion to Consolidate Related Actions.

9 On December 18, 2008, Plaintiff Nakash and NVIDIA filed a Joint Motion
10 To Continue Case Management Conference, which was scheduled by the Court for
11 January 26, 2009.²

12 On December 30, 2008, the Court granted the Motions to Relate, denied the
13 Motion to Consolidate Related Actions and denied as premature Plaintiffs’ Joinder
14 and Motion to Appoint. In its December 30th Order, the Court vacated the January
15 26, 2009 Case Management Conference and set a Case Management Conference
16 for February 23, 2009. In light of the rescheduling of the Case Management
17 Conference, the Court denied as moot Nakash’s and NVIDIA’s Joint Motion to
18 Continue Case Management Conference.

19 On January 22, 2009, NVIDIA filed an Administrative Motion to relate the
20 *Sielicki Action* to the *Nakash Action*. On January 23, 2009, Plaintiff *Nakash* filed
21 motions for his attorneys, Paul O. Paradis and Gina M. Tufaro, to appear Pro Hac
22 Vice.

23 On February 6, 2009, the Court granted Nvidia’s Administrative Motion to
24 relate the *Sielicki Action* to the *Nakash Action* and granted the Paradis and Tufaro
25 pro hac vice motions.

26
27
28 ² The *Waidzunas Action* was not included in the consolidation motion, but counsel for *Waidzunas* have since agreed to consolidation.

HP's Statement of Prior and Pending Motions

In addition to the procedural history set forth above, HP's motion to mark *Waidzunus* related to *Inicom* was filed on January 9, 2009 and granted on January 16th. HP's motion to mark *LeBlanc* related to *Inicom*, filed on February 2, 2009, is still pending. As mentioned above, HP intends to file a motion to have *Decker* marked related to *Inicom* as well. Again, HP supports consolidation of the Related Actions and believes *Waidzunus*, *LeBlanc* and *Decker* should be consolidated with these cases as well.

B. Anticipated Motions

1. Motion to Relate

The parties respectfully request that the Court relate the *LeBlanc* and *Decker* Actions to the *Nakash* Action as soon as possible without any further briefing.

2. Motion to Consolidate

As noted in Section IV.A above, NVIDIA filed a motion to consolidate all of the Related Cases other than *Waidzunus* on December 10, 2008. The consolidation motion was joined by all Plaintiffs in the Related Cases other than *Waidzunus* on December 11, 2008 and December 16, 2008. The *Waidzunus* plaintiffs have since agreed to consolidation, and all parties in all of the Related Cases are thus in agreement on consolidation. After the Court has related all of the actions, the parties jointly request that the Court consolidate the Related Actions and any other future actions that arise from similar facts and circumstances, including the *LeBlanc* and *Decker* Actions, as soon as practicable, and without further briefing absent a request from the Court.

3. Motion to Appoint Co-Lead Counsel

Plaintiffs' Position

Counsel in all the Related Actions have repeatedly met and conferred, both

1 among themselves and with Defense counsel, concerning the need for the Court to
 2 appoint Plaintiffs' Co-Lead Counsel to ensure the interests of all Plaintiffs in all of
 3 the actions are represented by counsel who are well qualified.

4 As a result of the discussions among all of the Plaintiffs and their counsel, all
 5 of the Plaintiffs in the Related Actions (other than Plaintiff *Cormier*) are in
 6 unanimous agreement, and respectfully request that Horwitz, Horwitz & Paradis,
 7 Attorneys at Law, counsel to Plaintiff *Nakash*, Doyle Lowther, LLP, counsel to
 8 Plaintiff *Inicom*, and Milberg, LLP, counsel to Plaintiff Feinstein, be appointed as
 9 Co-Lead Counsel for the Class.

10 The only Plaintiff to have voiced any opposition to the proposed Co-Lead
 11 structure is Plaintiff *Cormier*. The parties are hopeful that Plaintiff *Cormier* will
 12 reconsider his position on this issue prior to the Case Management Conference. In
 13 the event Plaintiff *Cormier* remains steadfast in his opposition, Plaintiffs will move
 14 for appointment of Co-Lead Counsel in accordance with the schedule set forth
 15 below. However, should Plaintiff *Cormier* reconsider his position, Plaintiffs will
 16 submit a stipulated proposed order concerning appointment of Co-Lead Counsel.

17 Defendant's Position

18 NVIDIA believes that Plaintiffs' Co-Lead counsel should be appointed for an
 19 expeditious administration and ultimate resolution of these actions.

20 **4. Motions Pursuant to Rule 12**

21 Defendants anticipate filing motions pursuant to Federal Rule of Civil
 22 Procedure 12 in accordance with the schedule listed below.

23 **5. Motion for Class Certification**

24 Plaintiffs will move for class certification in accordance with the Schedule
 25 below. Defendants anticipate opposing class certification.
 26
 27
 28

1 **6. Motions for Summary Judgment/Adjudication**

2 Defendants anticipate filing motions for summary adjudication and/or
3 summary judgment in accordance with the schedule listed below.

4 **7. Motion To Stay**

5 HP may also move to stay proceedings against it.

6 **8. Pre-Trial/Daubert Motions**

7 Defendants are likely to file pre-trial motions, including *Daubert* motions.

8 **V. AMENDMENT OF PLEADINGS**

9 Plaintiffs anticipate a need to amend pleadings or add parties in accordance
10 with the schedule below. Defendants agree that a superseding, consolidated
11 amended complaint governing the Related Actions, that would also subsume the
12 *LeBlanc* and *Decker Actions*, should be filed.

13 **VI. EVIDENCE PRESERVATION**

14 Plaintiffs and Defendants have agreed to discuss the cost of producing
15 electronically stored information (ESI), including, without limitation, production of
16 email and other electronic documents, as well as restoration of any ESI. In the
17 event the parties cannot agree on the scope of ESI production, the parties shall ask
18 the Court to resolve the dispute.

19 **VII. DISCLOSURES**

20 No party has served Initial Disclosures. Plaintiffs anticipate exchanging
21 Initial Disclosures in accordance with the schedule below.

VIII. DISCOVERY

A. Scope

Plaintiffs anticipate discovery will be needed on the following subjects:

- (1) the design, manufacture, testing and modification of the Nvidia GPUs;
- (2) Defendants' databases concerning the Nvidia GPUs failures;
- (3) all documents concerning return/repairs related to the Nvidia GPUs;
- (4) all documents sufficient to identify material specifications for the Nvidia GPUs;
- (5) all consumer complaints regarding the Nvidia GPUs;
- (6) all documents and communications concerning any governmental investigation into the Nvidia GPUs;
- (7) all documents concerning any other lawsuit against Defendants arising out of the Nvidia GPUs;
- (8) Defendants' representations in marketing and other materials regarding the Nvidia GPUs;
- (9) Defendants' knowledge of the alleged defect in the Nvidia GPUs;
- (10) Defendants' defenses to Plaintiff's claims; and
- (11) damages and other relief sought by Plaintiff.

B. Discovery Plan

Plaintiffs plan to serve Defendants with document requests, interrogatories and requests for admission. Plaintiffs' discovery requests will address issues relating to class certification, as well as the underlying merits of Plaintiffs claims. The parties are discussing a Protective Order, which will address production of

1 confidential information and assertions of privilege.

2 Defendants intend to take class, merits and expert discovery. The parties
3 believe that discovery should occur in an orderly fashion and in accordance with the
4 schedule listed below.

5 **C. Specific Limitations On Discovery**

6
7 **1. Depositions**

8
9 Because Defendants have not answered the Complaints in the Related
10 Actions or provided any document discovery, Plaintiffs are unable to state the exact
11 number of depositions they will need. Based on their investigation to date,
12 Plaintiffs anticipate that they may require at least twenty-five (25) depositions of
13 fact witnesses.

14 NVIDIA believes that the parties should follow the guidelines established in
15 the Federal Rules of Civil Procedure and that 10 is the maximum number of
16 depositions for fact witnesses and 5 is the maximum number of depositions for
17 expert witnesses, which may be taken by any one party pursuant to Federal Rule of
18 Civil Procedure 30(a)(2)(A)(i).

19 **2. Interrogatories**

20
21 The parties agree that 50 is the maximum number of interrogatories,
22 including subparts, which may be served by each side in this action, but reserve
23 their rights to revisit this issue as discovery develops.

24 **IX. CLASS ACTIONS**

25
26 **A. Class Definition**

27 Plaintiffs have brought suit on behalf of all those who purchased a computer
28

equipped with an NVIDIA GeForce Series GPU (“the Class”).³

B. Class Allegations

Plaintiffs must demonstrate that the proposed Class meets the four requirements of Rule 23(a) – numerosity, commonality, typicality and adequacy – and that the action is “maintainable” under Rule 23(b).

Based on Plaintiffs’ initial investigation, the proposed Class satisfies Rule 23’s numerosity requirement because, “the Class consists of thousands of individuals and is so numerous that joinder of all members as individual plaintiffs is impracticable.” While the exact number of Class members is unknown and can only be ascertained via discovery, Plaintiffs believe there are “thousands of Class members.” *See, e.g.,* Nakash Cplt. at ¶ 49(a).

The Class satisfies Rule 23’s commonality requirement because there are questions of law and fact common to the Class, including:

- (i) Whether Defendants have breached any warranties to the Class;
- (ii) Whether the Computers are merchantable as a result of the design defect in the NVIDIA GPU;
- (iii) Whether Defendants were unjustly enriched by retention of non-gratuitous benefits conferred by Plaintiff and Class members;
- (iv) Whether the Computers are defective because they are equipped with NVIDIA GPUs composed from a weak material set of die/package combination;
- (v) Whether Defendants knew, or were reckless in not knowing, that the Computers are defective; and

³ The proposed class definition may change based on evidence gathered during discovery.

(vi) Whether, as a result of Defendants' misconduct, Plaintiffs and the Class are entitled to damages, restitution, equitable relief or other relief, and the amount and nature of such relief.

The Class satisfies Rule 23's typicality requirement. Each Plaintiff purchased a Computer equipped with a defective NVIDIA GPU. *Nakash* Cplt. at ¶6; *Inicom* Cplt at ¶12; *NBOA* Cplt. at ¶16, *West* Cplt. at ¶6; *Olivos* Cplt. at ¶14. Accordingly, Plaintiffs were damaged in the same manner as other Class members, and their claims are typical of the absent Class members' claims.

Plaintiffs satisfy Rule 23's adequacy requirement. Plaintiffs' have retained experienced counsel who have litigated hundreds of complex class actions and have no interests in conflict with the absent Class members' interests.

Plaintiff alleges the proposed Class is maintainable under Rule 23(b)(3), which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The Related Actions satisfy the predominance requirement because much of the Court's time will be devoted to addressing common factual issues. In particular, the Court must determine whether the NVIDIA GPUs are defective. This inquiry is not dependant on any individual factual issues, because, as NVIDIA has admitted, all of the Nvidia GeForce Series GPUs are defective. *Nakash* Cplt. at ¶28; *Inicom* Cplt at ¶24; *NBOA* Cplt. at ¶22, *West* Cplt. at ¶28; *Olivos* Cplt. at ¶6.

C. Defendants' Class Action Statement

Defendants dispute Plaintiffs' contention that these cases are properly maintainable as class actions, either separately or as a consolidated action, and disagree with Plaintiffs' assessment set forth above.

1 **D. Class Certification Schedule**

2 The parties have agreed to the schedule for class certification outlined below.

3
4 **X. RELATED CASES**

5 In Orders dated, December 3, 2008, December 30, 2008 and February 6,
6 2009, the Court found that the *Feinstein, Inicom, Cormier, NBOA, West, Olivos* and
7 *Sielicki Actions* are related to the *Nakash Action*. On January 16, 2009, the Court
8 related the *Waidzunus Action* to the *Inicom Action*. Additionally, HP has moved
9 this Court to mark *LeBlanc* related to the *Inicom Action* and HP plans to seek
10 similar treatment for the *Decker Action*.

11 **XI. RELIEF**

12 Plaintiffs are seeking actual damages, an injunction preventing Defendants
13 from manufacturing or selling the NVIDIA GPUs, declaratory relief and reasonable
14 costs and attorneys' fees.

15 Actual damages for Plaintiffs' warranty and consumer fraud claims are
16 calculated as the difference between the value of a Computer, as warranted and the
17 Computer, as received. Although discovery has not yet commenced, according to
18 Plaintiffs' initial investigation, Defendants sold tens of thousands of Computers
19 equipped with defective NVIDIA GPUs.

20 Actual damages for Plaintiffs' unjust enrichment claims are calculated based
21 on the profits received by Defendants from the sale of the Computers equipped with
22 the defective NVIDIA GPUs. Because the parties have not yet engaged in
23 discovery, Plaintiffs are unable to estimate actual damages for Plaintiffs' unjust
24 enrichment claims.

25 Defendants disagree that Plaintiffs are entitled to any relief. Further, HP
26 reserves the right to assert a counterclaim in response to the forthcoming
27 consolidated amended complaint. Defendants also reserve the right to seek costs
28

1 and attorneys' fees as appropriate.

2 **XII. SETTLEMENT AND ADR**

3
4 Plaintiffs have filed, or will soon file, their respective Alternative Dispute
5 Resolution ("ADR") Certifications pursuant to Civil Local Rule 16-8(b). All of
6 Plaintiffs' ADR certifications will be filed by February 23, 2009. At this time, the
7 parties believe ADR is premature.

8 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

9
10 The parties object to a magistrate judge conducting all further proceedings
11 including trial and entry of judgment. On October 27, 2008, NVIDIA filed its
12 Declination to Proceed before a U.S. Magistrate Judge.

13 **XIV. OTHER REFERENCES**

14
15 The parties do not believe that the case is suitable for binding arbitration, a
16 special master or referral to the Judicial Panel on Multidistrict Litigation.

17 **XV. NARROWING OF ISSUES**

18
19 Plaintiffs anticipate that they will be able to narrow the scope of issues in
20 dispute in the litigation through the use of requests for admissions and
21 interrogatories. Defendants similarly will attempt to work with Plaintiffs to narrow
22 the scope of the issues in dispute. In addition, Defendants intend to file motions
23 pursuant to Fed. R. Civ. P. 12 and motions for summary adjudication and/or
24 summary judgment. Defendants believe that resolution of these motions will serve
25 to narrow or eliminate issues for trial.

26 **XVI. EXPEDITED SCHEDULE**

27
28 The parties agree that this action cannot proceed on an expedited basis.

XVII. SCHEDULING

Consolidation issues have already been briefed, and the parties believe that consolidation of all Related Actions should be finalized at the case management conference, or as soon thereafter as reasonably practicable. A deadline for filing an additional consolidation motion is provided in the event the Court requires further briefing regarding consolidation.

Administrative motions to relate cases, if any, to be filed and served by:	February 27, 2009
Motions to consolidate all related cases, if necessary, to be filed and served by:	February 27, 2009
Motions for appointment of lead plaintiff/lead counsel, if any, to be filed and served by:	February 27, 2009
Oppositions to motions for appointment of lead plaintiff/lead counsel to be filed and served by:	March 6, 2009
Replies in support of motion for appointment of lead plaintiff/lead counsel to be filed and served by:	March 11, 2009
Consolidated complaint to be filed and served by:	May 29, 2009
FRCP 26(f) conference to be conducted by:	June 12, 2009
Initial disclosures to be exchanged by:	June 15, 2009
Fact discovery to commence on:	June 19, 2009
Rule 12 motions to be filed and served by:	July 13, 2009
Oppositions to Rule 12 motions to be filed and served by:	August 27, 2009
Replies in support of Rule 12 motions to be filed and served by:	September 16, 2009
Plaintiffs' motion for class certification, and any expert reports plaintiffs intend to use in support of class	

1	certification, to be filed and served thirty days after	
2	entry of an order on defendants' motion to dismiss.	
3	Defendants' opposition to Plaintiffs' motion for class	
4	certification, and any expert reports Defendants intend	
5	to use in opposition to class certification, to be filed and	
6	served 45 days after service of Plaintiffs' class	
7	certification motion.	
8	Depositions of Plaintiffs' expert witnesses (if any) on	
9	class certification issues must be concluded by this date.	
10	Plaintiffs' reply in further support of class certification,	
11	and any rebuttal expert reports plaintiffs intend to use	
12	in connection with class certification, to be filed and	
13	served 30 days after service of Defendants' opposition to	
14	class certification.	
15	Depositions of Defendants' experts (if any) on class	
16	certification issues must be concluded by this date.	
17	Fact discovery cut-off:	January 29, 2010
18	Plaintiffs' expert designations on issues other than class	February 26, 2010
19	certification, including expert reports and information	
20	required by Fed. R. Civ. P. 26(a)(2), to be served by:	
21	Defendants' expert designations on issues other than	March 31, 2010
22	class certification, including expert reports and	
23	information required by Fed. R. Civ. P. 26(a)(2), to be	
24	served by:	
25	Plaintiffs' rebuttal expert designations on issues other	April 30, 2010
26	than class certification, including expert reports and	
27	information required by Fed. R. Civ. P. 26(a)(2), to be	
28	served by:	

1	Defendants' rebuttal expert designations, including	May 28, 2010
2	expert reports and information required by Fed. R. Civ.	
3	P. 26(a)(2), to be served by:	
4	Expert depositions to commence by:	June 1, 2010
5	Expert depositions to be completed by:	July 2, 2010
6	Dispositive motions.	August 13, 2010
7	Motions for summary judgment and all other	
8	dispositive motions to be filed and served by:	
9	Oppositions to dispositive motions.	October 1, 2010
10	Oppositions to summary judgment or other dispositive	
11	motions to be filed and served by:	
12	Replies in support of dispositive motions.	October 15, 2010
13	Replies in support of summary judgment or other	
14	dispositive motions must be filed and served by:	
15	Motions in limine and Daubert motions.	November 1, 2010
16	Motions in limine and Daubert motions to be filed and	
17	served by:	
18	Oppositions to motions in limine and Daubert motions	November 12, 2010
19	Oppositions to motions in limine and Daubert motions	
20	to be filed and served by:	
21	Replies in support of motions in limine and Daubert	November 26, 2010
22	motions.	
23	Replies in support of motions in limine and Daubert	
24	motions to be filed and served by:	
25	Final witness list and exhibits.	December 24, 2010
26	Lists of witnesses and exhibits under Fed. R. Civ. P.	
27	26(a)(3) to be filed and served by:	
28		

1	Joint pre-trial plan	December 24, 2010
2	The joint pre-trial plan to be filed by:	
3		
4	Pre-trial conference.	January 2011
5	Trial begins.	January 2011

6

7 **XVIII. TRIAL**

8 Plaintiffs have requested a jury trial. The parties are currently unable to
 9 estimate the number of days required for trial given that the parties have not yet
 10 engaged in discovery. The parties propose that the Court, at this time, allow
 11 fourteen (14) court days for trial, and revisit the issue after the conclusion of non-
 12 expert discovery. The parties believe that a more accurate assessment of the length
 13 of the trial can be determined as discovery nears completion.

14 Defendants do not agree that a jury trial is appropriate for all claims currently
 15 at issue and, at this time, are uncertain which, if any, claims will survive against
 16 them.

17 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR**
 18 **PERSONS**

19 The parties have filed their respective “Certifications of Interested Entities or
 20 Persons” pursuant to Civil Local Rule 3-16. Pursuant to Civil L.R. 3-16, Plaintiffs
 21 have certified the following listed persons, associations of persons, firms,
 22 partnerships, corporations (including parent corporations) or other entities have a
 23 financial interest in the subject matter in controversy or in a party to the proceeding:
 24

- 25 • Plaintiff Nakash;
- 26 • Plaintiff Inicom;
- 27 • Plaintiff NBOA;
- 28 • Plaintiff West;

- Plaintiff Olivos; and
- Plaintiff Sielicki.

Additionally, pursuant to Civil L.R. 3-16 and Rule 7.1 of the Federal Rules of Civil Procedure, Defendant NVIDIA has made the following disclosure statements:

1. NVIDIA certifies that other than the named parties, there are no interested entities or persons to report.
2. NVIDIA states that it has no parent corporation and that no publicly-held corporation owns more than 10% of its stock.

Finally, pursuant to Civil L.R. 3-16 and Rule 7.1 of the Federal Rules of Civil Procedure, Defendant HP makes the following disclosure statements:

1. HP certifies that other than the named parties, there are no interested entities or persons to report.
2. HP states that it has no parent corporation and that no publicly-held corporation owns more than 10% of its stock.

XX. OTHER MATTERS

The parties are negotiating the terms of a Protective Order.

1 Dated: February 13, 2009

/s/ Paul R. Kiesel

2 Paul R. Kiesel
3 **KIESEL, BOUCHER & LARSON LLP**
4 8648 Wilshire Boulevard
5 Beverly Hills, CA 90211
6 Telephone: 310-854-4444
7 Facsimile: 310-854-0812

8 Paul O. Paradis
9 Michael A. Schwartz
10 Gina M. Tufaro
11 **HORWITZ HORWITZ & PARADIS,**
12 **ATTORNEYS AT LAW**
13 28 West 44th Street - 16th Floor
14 New York , NY 10036
15 Telephone: 212-404-2200
16 Facsimile: 212-404-2226

For Plaintiffs Nakash and West

12 Dated: February 13, 2009

/s/ Robert P. Varian

13 Robert P. Varian
14 James N. Kramer
15 **ORRICK, HERRINGTON & SUTCLIFFE LLP**
16 405 Howard Street
17 San Francisco, CA 94109
18 Telephone: 415-773-5700
19 Facsimile: 415-773-5759

For Defendant NVIDIA Corp.

19 The filer shall attest that concurrence in the filing of the document has been obtained from
20 each of the other signatories, or from a single signatory (in the case, e.g., of a declaration) which
21 shall serve in lieu of their signature(s) on the document.
22
23
24
25
26
27
28

PROOF OF SERVICE VIA ECF SYSTEM

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. On February 13, 2009, I served the foregoing document on the interested parties in this action.

**BY CF/ECF SYSTEM**

On the date indicated above, I electronically filed the documents in pdf format with the Clerk of the Court using the CM/ECF filing system. I am personally and readily familiar with the business practice of Orrick Herrington & Sutcliffe LLP for collection and processing of document(s) to be transmitted electronically. The CM/ECF transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 13, 2009 at San Francisco, California.

/s/ Burton Clarke

Burton Clarke